No. 172.

Brf. of Maddox for D. & C.

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OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

ARGUMENT AND BRIEF IN BEHALF OF DEFENDANT IN ERROR.

SAM'L MADDOX,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-28-'01

Supreme Court of the United States.

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THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

Statement of Facts.

This is a writ of error which seeks to reverse a judgment recovered by the Camden Iron Works, a corporation having its principal office in Philadelphia, for a balance due by the District of Columbia for certain iron pipe manufactured and delivered under and in accordance with a contract, in writing, in that behalf duly made and signed.

The contract in question was prepared in the office of the District Commissioners, most of it being printed. It purported to be between the District of Columbia and the Camden Iron Works. The words "District of Columbia" in the introductory clause are in print. The attestation clause, all in print, is as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of

Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

" ——— ———, [L. S.]
" ——— ———, [L. S.]
" ——— ———, [L. S.]
" *Commissioners of the District of Columbia.*"

Without being signed by any official of the District, and with the date left blank, it was forwarded for execution by mail to the contracting company at Philadelphia. On the 29th of June it was signed and formally executed by the Camden Iron Works, the corporate seal of the company being affixed, and mailed the same day to the Commissioners of the District. The letter transmitting the contract bears date the same day (R., p. 21).

After waiting thirteen days, the contract not having been in the meantime returned, the treasurer of the company wrote to Colonel Ludlow, the then Engineer Commissioner, asking for its return by "return mail" (R., p. 22). Ten days later the company wrote again for the contract, in part as follows:

"We shall be ready to start making them (the pipe) very soon, but, of course cannot do so until we have the proper papers" (R., p. 23).

Nor was the contract received back by the company until the 4th day of August, and then it did not bear the signature of Mr. Webb, one of the Commissioners (R., p. 34).

The contract provided for the manufacture of certain iron pipe and its complete delivery "within 136 days after the date of the execution of the contract" (R., p. 15), one-half of each size to be delivered on or before September 25, 1887, the remainder on or before November 10, 1887 (R., p. 13).

For failure to deliver within the time thus fixed the contract provided that there would "be deducted from the con-

tract prices, as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent" (R., p. 13). There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract "the sum of ten dollars ($10) *per diem* for the same period estimated as liquidated and fixed damages to the District" (R., p. 15). Both of these provisions were in print.

The contract also provided for the appointment of inspectors, though it did not say by whom they should be appointed, whose duty it was to point out to the contractors "any neglect or disregard of the specifications" (R., p. 15), but their decision was not final; that was remitted to the Engineer Commissioner (R., p. 14).

Payments were to be made after August 1 for all pipe "received and accepetd in proper order and condition, * * * less 20 per cent. of the amount found due, to be reserved until the satisfactory completion of the contract" (R., p. 13).

Immediately upon the receipt of the contract on August 4 the contractors made ready to cast the pipe as required by the specifications. About one-third of the quantity required was cast during the month of August and the early part of September (R., p. 41). The contracting company notified Colonel Ludlow, in a letter dated August 4, that they would be ready for an inspector about August 12. In the same letter, Mr. Wood, president of the company, notified the Commissioners that if it was their intention to send on Mr. Hoyt as an inspector it would be necessary to waive the dates of delivery specified in the contract (R., p. 23). Several letters passed between the parties on the subject of Hoyt's appointment, and finally, on September 5, Mr. Wood said, in his letter of that date, "He is not a proper man for the position" (R., p. 26).

Thereupon, and after it appeared that the District officials

insisted upon having Hoyt inspect and pass upon the pipe, work on the Washington pipe was stopped and the pipe then cast, in part performance of the contract, was sold to other parties (R., p. 34).

Mr. Wood objected to Hoyt because he rejected as defective so many pipes that were entirely in accordance with the specifications. This made it impossible for the contractor to perform the contract in the short time given for that purpose (R., p. 24).

After the company had concluded to abandon the contract, and somewhere between the 10th and 15th of September, Colonel Ludlow, unsolicited, went to see Mr. Wood at his office in Philadelphia. The matter was talked over in a friendly way, and Mr. Wood was given to believe that if the objection to Hoyt was withdrawn, no penalties for delay in delivering would be charged. Thereupon Mr. Wood requested Hoyt's immediate return; but he did not arrive till the 17th of October, causing a further delay of 33 days (R., p. 35).

In their letter of June 22 Mr. Wood suggested a change in the method of casting the 3″ pipe, which he thought would give better results than if cast strictly in accordance with the specifications. This led to correspondence back and forth, the last letter on the subject by Captain Symons, assistant to the Engineer Commissioner, saying, " If I can get away I will come over perhaps next week, and possibly then the change may be authorized " (R., p. 31); but under date November 1 he wrote again to say that the 3″ pipe must be made in accordance with contract specifications (R., p. 32).

Work was begun again by the company immediately upon the return of Hoyt; but out of 2,726 lengths of pipe inspected by him he rejected 435, or nearly one-sixth, that were perfectly good and were sold to other parties at full prices (R., pp. 35, 40, and 41).

But a small proportion of the pipe was delivered prior to the 30th day of November. On that day Captain Symons

wired the company to know if they would consent to a cancellation of the contract, *quoad* the remaining 12″ pipe. On the same day he wrote in explanation: "The question of available funds is the only and sole question involved" (R., p. 33). Mr. Wood replied, consenting to the proposed cancellation, provided that all pipe then cast should "be taken and paid for at the regular contract price, without any deduction" (R., p. 32). On December 2, Captain Symons wrote, by direction of the Engineer Commissioner, that only pipe then manufactured would be received, and the company was requested to "send on and deliver the pipe which is now made and accepted by the inspector" (R., p. 34).

After December 1 pipe worth $11,404.09 at contract rates was delivered to and accepted by the District. None of it would have been sent if Mr. Wood had supposed that fines and penalties would be charged as for delays in delivery. No particular haste was manifested in these latter deliveries because of Captain Symons' letter saying that the pipe could not be laid till a further appropriation by Congress. The last consignment was delivered February 27, 1888. All the pipe called for by the contract was actually delivered except what the Commissioners declined to receive.

The total value at contract rates of all pipe delivered was $16,335.87, on which there was paid in cash $5,291.71 by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract. The balance, $11,044.16, was charged as fines and penalties for not delivering the pipe within the time specified in the contract. The fines charged against the consignment of pipe delivered February 27 exceeded by $529.83 the value of that consignment at contract prices (R., p. 19).

On receipt of a statement of account, made up in the office of the District auditor, showing fines and penalties about equaling the value of all the pipe delivered after December 1, the company protested against this plan of payment. Officers of the company made several trips to Wash-

ington, and on one of them Mr. Wood was referred to Colonel Ludlow, who had ceased to be a District Commissioner and was then in Detroit. He went twice to Detroit to see him, but Colonel Ludlow declined to make any recommendation in the matter. Correspondence followed, the last letter on the subject by Mr. Wood to the Commissioners bearing date November 10, 1892. In reply to this the Commissioners wrote finally declining to readjust the account and advising the company to apply to Congress for relief (R., p. 39).

This was done in the following February, Mr. Wood supposing that it was a matter of routine and that the Commissioners would look after the bill and recommend its passage. After waiting a year and more for Congress to act, the company gave up all hope of securing a settlement out of court, and counsel was retained to bring suit in the spring or early summer of 1894. The suit was begun February 26, 1895.

The plaintiff in error relied upon no fact by way of meritorious defense to the action. Captain Symons testified as a witness that he visited the Millville foundry during the progress of the work and examined some of the pipes rejected by Hoyt. He found them "eccentric," but did not know whether or not they were part of the pipe rejected by Miller, the inspector of the contracting company, and afterwards broken up (R., p. 43). He did not notify any official of the company of his intended visit. Hoyt was not produced as a witness. No evidence was adduced tending to show pecuniary loss to the District by reason of delay in delivering the pipe. It was not disputed that pipe worth, at contract prices, $11,044.16 was passed by Inspector Hoyt, delivered to the District, and used in the extension of the water service, but never paid for.

POINTS AND AUTHORITIES.

I.

The contract sued on in this action is a sealed instrument and was intended so to be by all the parties to it.

A seal is not necessarily any particular form or figure; any mark or sign indicating an intention to seal is sufficient.

"The world has outgrown the necessities of an age when men made their seals because they could not write. What then from necessity attested the very act of execution and the genuineness of it is now but a mere arbitrary form, through which, however, special obligations still attach in support of the well-recognized distinction between contracts which are sealed and those which are not.

"A seal is not necessarily any particular form or figure. When not of wax, it is usually made in the form of a scroll, but the letters 'L. S.' or the word Seal inclosed in brackets or in some other design are in frequent use. It may, however, consist of an outline without any inclosure. It may have a dark ground or a light one. It may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form. It may be a simple dash or flourish of the pen.

"Whether the instrument is under seal or not is a question to be determined by the court upon inspection; and whether or not any mark or impression shall be held to be a seal depends wholly upon the intention of the party executing the instrument, as exhibited upon the face of the paper itself."

Dash "——" following signature held to be a seal.

Hacker's Appeal, 121 P. St., 192.

Approved in 160 U. S., 519.

"It is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used be impressed by the party on the plain parch-

ment or paper, with an intent to seal it, it is clearly sufficient, and, therefore, where the instrument is a deed and properly stamped, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appears on the parchment or paper."

Sugden on Powers, vol. 1, star page 283.

In Bowman *vs.* Robb, 6 Pa. St., 302, the letters "L. S." inclosed in a circle were opposite a line midway between the signatures of two makers of a note, which concluded "Witness our hands and seals." Held that the seal applied to both.

"The object of a seal is to give character to the instrument, and enable it to be distinguished and recognized for that which it was intended to be. This is as well effected by a scrawl with a word seal written within it, or with the initials 'L. S.,' a common mode resorted to in copying sealed instruments.

Hastings *vs.* Vaughn, 5 Cal., 318.

"The act of signing in front of a device (seal) is an adoption by the signer of that device as his seal. To hold that parties executing such instruments do not adopt such printed devices as their seals by signing their names in front of them would lead to disastrous consequences."

Osborn *vs.* Kistler, 35 Ohio St., 102.

Any letters, such as "L. S.," or a circumflex scroll made by a party in connection with the words "sealed" or "Witness my hand and seal," or approved by evidence *aliunde* to have been intended as a seal, will constitute a valid seal.

McKain *vs.* Miller, 1 McMullan Law (S. C.), 312.

The court says:

"Any stamp, impression or mark made or adopted by the signer to a written contract, and annexed to his signature *as and for his seal*, would seem to answer the purpose of sealing in order to render the contract a sealed instrument."

* * * "Whenever the intention to seal is so plain the jury are warranted in inferring that the signer fulfilled his intention, practically, by adopting the printed L. S. as his promised seal."

In 20 Ills., 389, it was held that assumpsit would not lie against the makers of a note who signed their name in front of the sign (—); that it was a sealed instrument.

We feel warranted by common sense, by justice and sound reason, as well as by the principles of law, to presume that all the signers of an instrument indicating upon its face an intention to seal it adopted any seal or scrawl that may be annexed to the name of one. The obligors will be left to rebut that presumption by plea and issue.

Davis *vs.* Burton, 3 Scammon, 41.

In the District of Columbia a printed seal at the end of a signature is sufficient to make the instrument a specialty. "No hesitation in saying so," says Judge Cox.

Green *vs.* Lake, 2 M., 162.

"It is time that such objections to the validity of seals should cease."

Pillow *vs.* Roberts, 13 Howard, 474.

The District of Columbia is a municipal corporation unique in its nature. The details of management and government are entrusted to three Commissioners. They have power to make contracts binding upon the District, with the single restriction that if the amount involved exceeds $100 the contract must be signed by all three of them. They are officials of the United States, being appointed by the President and confirmed by the Senate. The United States therefore govern the District of Columbia through its agents, the Commissioners.

Metr. R'w'y Co. *vs.* D. C., 132 U. S., 9.

The present form of government was established by an act of Congress approved June 11, 1878. Though authorized to have a seal, no formal action looking to the adoption of any device as a seal was taken until September 23, 1887, three months after the contract sued upon was prepared for execution. The attestation clause being in print, and it being the manifest intent to make the contract an instrument under seal, we must infer that this form of attestation and seal were adopted and in universal use as the seal of the municipal corporation.

It is well settled that a corporation may adopt and use any seal it chooses, for the time, as an individual.

Bank *vs.* Rutland, etc., R'w'y Co., 30 Vt., 171.
Milldam Foundry *vs.* Hovey, 21 Pick., 428.
Ransom *vs.* Stoughton, 13 N. J. Eq., 212.
S. Baptist Society *vs.* Clapp, 18 Bar., 36.

"If an agent of a corporation have authority to make a mortgage, and affixes thereto anything which the law recognizes as a seal when affixed by a natural person, it will be a good execution presumptively by the corporation."

Johnston *vs.* Crawley, 25 Geo., 316.

This point has been conclusively set at rest by this court in a series of decisions. The first of the cases is—

Hodgson *vs.* Dexter, 1 Cranch, 345.

This was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late Secretary of War, for not keeping in good repair and for not delivering up in like good repair at the end of the term certain premises which had been leased by the plaintiff to the defendant for the purpose of offices for the War Department, the building having been entirely destroyed by fire during the term.

The lease purported to be made by the lessee as Secretary of War and under his hand and seal.

In deciding the case the court, by Mr. Chief Justice Marshall, say:

"It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government, not the officer. A contrary doctrine would be productive of the most injurious consequences to the public as well as to the individual.

"The court is unanimously of the opinion that this contract was entered into entirely on behalf of the Government, by a person authorized to make it, and that its obligation is on the Government only."

"It may be stated generally that when a deed is executed or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract and can alone claim its benefits."

Sheets *vs.* Selden's Lessee, 2 Wall., 187.

See also Eureka Co. *vs.* Bailey Co., 11 Wall., 488.

The latest decision on the subject is Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514.

Declaration in covenant on a lease. The *testimonium* clause was:

"In witness whereof the parties hereto have hereunto set their hands and seals this the day and year above written."

JACKSONVILLE, &C., CO.,
By ALEX. WALLACE, *President.* [SEAL.]

Demurrer that there is no seal of the company to said paper.

Held sufficient on demurrer.

Third and fourth assignments of error, that it was error to put in evidence the duplicate lease, because they were not

shown to be under the seal of the company, but appeared to be under the private seal of the president.

"But in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

"Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper.

"The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal for the purpose of executing the contract in question."

Throughout the several States of the Union the reports abound in well-considered cases, holding that a contract such as that sued on in this action is the *covenant* of the corporation. A few only of these will be noticed.

"Where a contract is entered into, or a deed made, in behalf of the Government, by a duly authorized *public* agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the Government, who alone is responsible, and not of the agent."

Stinchfield *vs.* Little, 1 Greenleaf, 231.

In a case found in the California reports the action was predicated upon the assignment of a contract entered into by one Estill and a board of commissioners created by statute, being the lieutenant governor, controller, and treasurer, and authorized to lease certain prison grounds and convict labor. The contract begins with a recital of the names of the members of the board, with their official designations, "party of the first part," and concludes:

"In witness whereof Robert M. Anderson, lieutenant governor of the State of California; George W. Whitman, controller of the State of California, and Henry Bates, treasurer

of the State of California, constituting the board of State prison commissioners, and the said James M. Estill, party of the second part, have hereunto set their hands and seals the day and year first above written.

"[SEAL.] R. M. ANDERSON,
"[SEAL.] GEO. W. WHITMAN,
"[SEAL.] HENRY BATES,
"*Board of State Prison Commissioners.*
"[SEAL.] J. M. ESTILL."

Field, C. J., announced the opinion of the court, and says, in reply to an objection that the contract was defectively executed from the fact that it was signed by the commissioners with their individual names and not with the name of the State (456):

"The contract purports, in its body, to be between the State, acting by the commissioners, under the act of the 21st of March, 1856, of the one part, and Estill on the other, and is signed by the commissioners with the affix 'board of State prison commissioners.' The instrument does not purport to be the act of the commissioners alone, but the act of the State by them. The State, by them, makes the lease and contract, and it is with the State that the lessee enters into the covenants and agreements contained in the indenture.

"The objection is applicable only to contracts of a private character, made in cases of a mere private agency. A different rule exists in reference to contracts executed by agents of the Government. In such cases, says Mr. Justice Story, in speaking of the liability of public agents, the presumption prevails that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties."

State *vs.* McCauley, 15 Cal., 429.

In Hopkins *vs.* Mehaffy, 11 S. and R., 126, it appeared that defendant had signed and affixed his individual seal to a contract purporting to be made by and for the benefit of "the president, managers, and company of the Manchester Turnpike road." Suit was brought against Mehaffy as an individual. Held not liable. The court say:

"There is a striking and substantial difference between the covenants of an agent who describes himself as contracting for his principal and the covenant of a principal through the means and by the instrumentality of an agent. The first is the covenant of the agent and the second is the individual covenant of the principal; and in this respect the case at bar differs from Randall *vs.* Van Vechten, in which the distinction seems not to have been adverted to. No decision can be found in support of the position that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney (which, by the by, is the legitimate form of the instrument where the attorney is not to be bound) shall be taken to be the proper covenant of the attorney wherever he had not authority to execute the deed.

"This is precisely the case before us. In the body of the instrument the covenants are stated as if they were made by the corporation directly with the plaintiff without the agency of any one, the defendant not being named."

The East Warren Lumber Co. executed a mortgage to secure its promissory note. The by-laws of the company authorized the president and treasurer to execute transfers of real estate. The *testimonium* clause was:

"In witness whereof, we have hereunto set our hands and seals, etc."

DAVID C. FRENCH, [SEAL.]
President of the East Warren Lumber Co.
APHRAIM S. CALLEY, [SEAL.]
Treasurer of the East Warren Lumber Co.

Held the deed of the corporation.

The court say, *inter alia:*

"The construction of the deed is to be made upon the whole instrument, and not upon particular parts only. Effect is to be given to it, according to the intention, whenever it can by law be done. No part of the language is to be rejected, if it admits of a construction consistent with the general intent of the writing, but if the general intention of the instrument can be distinctly seen, and there is any part of its language which is irreconcilable with the rest, or if

there is any part which would render the deed invalid, if effect should be given to it according to its natural construction, and it is capable of any other construction consistent with the general intent, that construction is to be adopted. And if there is any part which, upon any construction of which it is capable, is inconsistent with the principal purpose of the instrument, and must necessarily defeat its operation, it is to be rejected as a mere mistake.

"In the present case, upon the attendant facts, it is impossible to doubt the purpose of these parties.

"The names of the agents of the company, which are subscribed do not appear in the body of the instrument, and they are in no way referred to in it. Nor is there any pretense, that upon the terms of the instrument or upon any construction any person can be regarded as the grantor but the Lumber company.

"It is argued that because there is a seal against the name of each of the signers, the president and treasurer of the company, they must be deemed not the seals of the company but the seals of the agents. This construction is forbidden by the general principles stated, and either seal might properly be rejected as inconsistent with the general intent of the instrument, if that was necessary to prevent the defeat of the deed, but it is not."

Tenney *vs.* Lumber Co., 43 N. H., 344.

Mortgage of the Flower Brook Manufacturing Co.—The *testimonium* clause was in these words:

"In witness whereof we have hereunto set our hand and seal this 15th day of December, A. D. 1842."

The deed was signed "William Wallace, agent for the Flower Brook Manufacturing Company," and seal. The corporation had no corporate seal.

Held, the deed of the corporation.

McDaniels *vs.* Flower Brook Manfg. Co., 22 Vt., 274.

"The signature of the duly authorized agent of the corporation executing the instrument in its behalf being proved, the seal, though mere paper and wafer without any specific stamp or mark, will be presumed to be the seal of the corporation."

Stebbins *vs.* Merritt, 10 Cush., 34.

"A corporation may execute a deed in these words: 'In testimony whereof said party of the first part have caused these presents to be signed by their president and their common seal to be hereto affixed. A. B., pres't,'" and seal.

Haven *vs.* Adams, 4 Allen, 80.

"The ancient doctrine of the common law was that a corporation could only act through the instrumentality of its common seal. But whatever may be the original correctness of this doctrine, as applied to corporations, existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors." * * *

"Every corporation created by statute may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned."

Fleckner *vs.* Bank of U. S., 8 Wheat., 357 (decided in 1823).

The current of authority in favor of the proposition that the contract sued on in this action is the *covenant* of the District of Columbia is overwhelming. Here and there in the State reports may be found occasional rulings in the opposite direction, but these are contrary to the vast current of authority. Besides, all of these seemingly adverse decisions, where they did not turn on other points, are at variance with the reasoning of Hodgson *vs.* Dexter, Sheets *vs.* Selden, and Jacksonville, &c., R'w'y Co. *vs.* Hooper, *supra*. A few only of these will be noticed.

In Regents, &c., *vs.* Detroit, &c., Society, 12 Mich., 156, the opinion was announced by Christiancy, J. He cites no authority in support of his conclusion. The case turned largely on other points, and there was a dissenting opinion.

In Blanchard *vs.* Town of Blackstone, 102 Mass., 307, it is stated in the opinion of the court: "It is unnecessary to

inquire whether either of the seals affixed could be deemed the seal of the town."

Caldwell *vs.* Morgantown Mfg. Co., 28 S. E. Rep., 475, turned on the failure of a grantor corporation in a deed to comply with the requirements of the code of North Carolina

Whitford *vs.* Laidler, 94 N. Y., 145, decides that lessees acting in behalf of and as officers of a corporation are not personally liable to pay the rent reserved.

Savings Bank *vs.* Davis, 8 Conn., 191, was decided by a divided court. Three of five judges did not sit, and the case can only be considered as the individual opinion of a single judge.

Mitchell *vs.* St. Andrews, &c., Land Co., 4 Fla., 200, if it can be considered an authority for anything, is in direct conflict with the conclusion of Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514, an appeal from the northern district of Florida.

In the case of Randall *vs.* Van Vechten, 19 Johns. R., 59, the agreement sued on purported to be made on the part of the town by "a committee appointed by the honorable the corporation of the city of Albany for that purpose." The members of this committee signed this agreement and affixed thereto their individual seals. They were sued as individuals, and it was held that they were not liable. What is said in the opinion about an action of covenant on the contract as against the town is purely *obiter*. The case turned on a proposition of the court that "the corporation seal is the only organ by which the body politic can covenant." This is opposed to the conclusion of the Supreme Court in Fleckner *vs.* Bank, *supra*. See also comments on this case in Hopkins *vs.* Mehaffy, 11 S. & R., 128.

In The Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21, it appears that the bank, by an agreement signed by its president and cashier, undertook to sell a certain lot of ground to G., who paid the purchase price. But the bank could not make title, and G. sued for a return of the money

he had paid. The action was in assumpsit against the bank as for money had and received. The court decided the action well brought, and though it in terms approves of the ruling in Randall *vs.* Van Vechten, such approval was *obiter*.

The discussion of this branch of the case can well be concluded by reference to the case of—

Heidelberg School District *vs.* Horst, 62 Pa. St., 307.

In this case certain officials duly authorized to borrow money for the town gave their bond for its repayment, describing themselves as "school directors of Heidelberg township." The bond was signed by them in their individual capacity, with scroll seals opposite each name. The trial court instructed the jury:

"The school directors had the right to borrow the money for the purposes indicated by the resolution, and the bond given is not binding on the men who signed individually, but on the municipality only."

The opening sentence of Agnew, J., who announced the opinion of the supreme court confirming this ruling, is peculiarly appropriate here:

"This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed, and we think the corrective power of the court is sufficient to prevent it."

II.

It was not only competent, but essential to the issues, for the plaintiff below to show when the contract was executed.

The contract provides that the contracting company should have "136 days after the date of the *execution* of the contract" for completing the delivery of the pipe (R., p. 15). True it may be that the contract was "made and concluded" on the 29th

day of June, for on that day the Camden Iron Works signed the contract which had been prepared in the office of the District Commissioners. In other words, the terms of the contract were on that day agreed upon by the parties to it; but it was not yet a contract, for the law required that it be first signed by all three of the Commissioners. A distinction is thus drawn between the date of the contract and the date of execution. As is well said by the trial court (R., p. 49):

"The provision is that 'all work must be commenced within — days and completed within 136 days after the *date of the execution of the contract.*' It appears to me that if it had been intended to indicate by that language the *date* of the contract, it would have been much easier and more simple to have said from the *date* of the contract than from the *date of the execution of* the contract."

The purpose of this peculiar provision is manifest. It will be remembered that the fines and penalties for delay in delivery imposed upon the contractors were very onerous, while the time for doing the work was very short. To take away from this while waiting for the Commissioners, all of them, to sign the contract, would have been requiring more of the contractors than even the Board of Commissioners, as then constituted, would exact. Hence provision was made for possible delays in the office of the Commissioners by drawing a distinction between the date of the contract and the date of the execution of the contract.

"But it is always competent to show that a deed was executed on a day subsequent to date on which the deed itself is stated to have been executed."

Hall *vs.* Cazenove, 4 East., 477.
Baldwin *vs.* Freydenhall, 10 Ill. App., 112.
Commonwealth *vs.* Welch, 144 Mass., 356.
Bruce *vs.* Slump, 82 Va., 352.

The date appearing on the face of a contract is not conclusive, even against the parties to it.

School District *vs.* Stilley, 36 Ills. App., 135.
Treadwell *vs.* Reynolds, 47 Cal., 171.

The time of the delivery of a deed may be proved by parol.

Maybury *vs.* Brien, 15 Peters, 21 (38).

The delivery of a deed is presumed to have been made on the day of its date. But this presumption is removed by evidence that it was made on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day and not on the day of its date.

U. S. *vs.* Le Baron, 19 Howard, 73.

A deed takes effect only from the time of its delivery.

County, etc., *vs.* American Emigrant Co., 93 U. S., 126.

The discussion of the learned Chief Justice, who announced the judgment of the Court of Appeals, is conclusive of this branch of the case. He says (R., p. 63):

"The next question is that which relates to the admissibility of parol evidence to show that the contract was in fact executed and delivered by the Commissioners at a date subsequent to that stated in the contract. But this question we think is without reason or principle to support it. No principle is better established than that it may be averred in pleading and shown in proof that a deed, bond, or other instrument, was in fact made, executed and delivered at a date subsequent to that stated on its face. In the old case of Oshey *vs.* Sir Baptist Hicks, Cro. Jac., 263, in an action of covenant, where, by a charter-party under seal, *bearing date the 8th of September*, it was agreed that the defendant should pay for a moiety of the corn which *then* was, or afterwards should be, laden on board a certain vessel, the defendant pleaded that the deed was not delivered *until the 28th day of October*, and that on and after that date there was no corn

on board; and, on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the actual delivery of the charter-party, and not to its date."

"And so in the case of Hall *vs.* Cazenove, 4 East, 477, it was held that a plaintiff could declare in covenant that the deed was *indented, made and concluded* on a day subsequent to the day on which the deed or charter-party on its face stated that it was indented, made and concluded. And in the more recent case of Steele *vs.* Mart, 4 B. & Cr., 272, in an action of debt on a lease, where the lease purported on its face to have been made on the 25th of March, 1783, *habendum* from the 25th of March now last past. It was proved that the delivery was made after the day of the date, and the court of king's bench held that the word *now* referred to the time of delivery, and not to the date of the lease. The same principle is clearly and fully stated by the Supreme Court, in the case of The United States *vs.* Le Baron, 19 How., 73."

"These cases are sufficient to show that there is nothing in the mere date as stated in the deed or contract to estop or preclude either of the parties from showing by parol evidence that the deed or contract was actually made and executed at a date subsequent to that stated in the deed or contract, and that, consequently, such deed or contract can only have effect and operation from the time of its actual execution."

III.

The District Commissioners by their conduct released the Camden Iron Works from strict performance of the covenant in respect of the time of deliveries.

a. The contract sued on in this action was signed by the Camden Iron Works on the 29th of June, 1887, and forwarded by mail on the same day. For some reason it was not returned to that company until the 4th day of August, then next, thus necessarily entailing a delay of 33 working days in the commencement of the work of casting the pipe specified in the contract.

b. At the Ludlow interview, about September 12, the Camden Iron Works requested the immediate return of the inspector. He did not do this till October 17 (R., p. 35), thus entailing a further delay of 33 days in the commencement of the work through no fault of the contractors.

c. Plaintiff in error offered no evidence to show when the contract was executed according to the requirements of the statute. It had not been so executed on the 4th of August, for it then lacked the signature of Mr. William B. Webb, one of the Commissioners. "It appears by the evidence that Mr. Webb was sick at the time and possibly away from the District of Columbia" (R., p. 50).

There is no date, therefore, shown by the evidence from which the 136-day period should begin to run. Until this is shown, the contractors cannot be charged with fines and penalties.

(The contract was signed at some date subsequent to August 4 by all of the Commissioners, and was duly copied in the book kept for that purpose in the office of the Commissioners, as required by the act approved June 11, 1878. See the testimony of Tindall, secretary of the Board of Commissioners—R., pp. 8 and 9.)

If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition.

Thus, if the precedent act is to be performed at a certain time or place and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the

condition as a bar to the responsibility which his part of the contract had imposed upon him.

Williams *vs.* Bank, 2 Peters, 102.

If a contracting party absolutely binds himself to perform things which subsequently become impossible of performance, or to pay damages for the non-performance thereof, and the thing which causes the impossibility might have been foreseen and guarded against in the contract, or arose from the act or default of the promisor, he will be held to a strict performance of the contract; but if the cause of the impossibility be of such character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, he will not be held by general words, which though large enough to include it, were not used with reference to the possibility of the particular contingency which afterwards happened.

Chicago, M., &c., R. R. Co. *vs.* Hoyt, 149 U. S., 14 & 15.

Delay of a city in preparing piers upon which a bridge is to be erected by a contractor, thereby hindering his work, will prevent any deduction for consequent delay in its completion, although his contract provides for deductions from the contract price in case of failure to complete the work within a certain time (Thayer, J., U. S. ct., E. dist. Mo.).

In this case the contractor was to begin work within one week after notice and complete within ten months. Notice for him to commence work was given December 12, 1887, but piers not completed until November 12, 1888. Contractor completed his work June 17, 1889, less than ten months and one week after the piers were in condition for him to begin work.

The difference between the time the work should have been completed after the notice of December 12, 1887, and when it was finished is seven months and twenty-eight days.

The street commissioner assessed damages for six months and thirteen days under the *per diem* deduction clause.

Where, by defendant's neglect, the plaintiff was prevented from completing the work in the time specified in the contract, the result is that the provision awarding damages in a given sum for delay in completing work is as effectually eliminated from the contract as if the parties had canceled it by express agreement. It is wholly immaterial whether we say the provision was waived or the defendant is estopped. In either event the result is the same (43 Fed. R., 762).

In Van Buren *vs.* Digges, 11 How., 479, it appeared that plaintiff had contracted to build and complete a house on or before the 25th of December, 1844, but delay was caused by extra work done by the defendant. Upon this point the court say:

"It is difficult to conceive upon what ground the defendant could be permitted to interpose an obstruction to the fulfillment of the contract, and then to convert that very obstruction into a merit on his part, or into the foundation of a claim against the party whom he had already subjected to the inevitable consequences of the obstruction so interposed; an inability to comply with his engagement and a postponement of the fruits of a compliance therewith, if that had been permitted."

In U. S. *vs.* Peck, 102 U. S., 65: It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.

See also Coal Co. *vs.* O'Hern, 8 Md., 201.

Coke Litt., p. 207, thus states the rule:

"If A. be bound in a bond that J. S. shall marry J. C. before such a day, and before the day B., the obligee, marry her himself, he shall never take advantage of the bond, for *that he himself* is the means that the condition could not be performed, and this is regularly true in all cases."

If he who is to be benefited by another's fulfilling *his* contract or agreement is the occasion why it is not carried into execution, the contract is thereby dissolved and the party bound discharged from his obligation.

Powell on Contracts, 417.

Cited in Marshall *vs.* Craig, 1 Bibb, Ky., 390.

"Hinderance by one party to a contract whereby the other party is prevented from completing his part of the contract within the time specified affords a legal excuse for non-performance within said period.

"An objection to the offering of any excuse by the plaintiff for not performing his part of the contract within the time stipulated is properly overruled."

Stewart *vs.* Keteltas, 37 N. Y., 388.

See also Hinckley *vs.* Pittsburg, &c., Co., 121 U. S., 264.

"He who prevents the performance of a thing of which he is to have the benefit cannot insist on any advantage from its non-performance. In such a case the act is considered as done, as far as respects the rights to arise upon its performance to him who was to perform it."

Ashcraft *vs.* Allen, 4 Iredell, L., 99.

The plaintiffs, on the 19th of April, 1836, entered into a written contract to build, for the sum of £1,700, a brewery for the defendants, so far as regarded the carpenter's work, within the space of four and a half months next ensuing the date of the agreement, and in default of completing the same within the time limited to forfeit to the defendants £40 per week for each week that the completion of the work should be delayed beyond the 31st of August, the amount to be deducted from the said sum of £1,700 as liquidated damages. The plaintiffs did not begin work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession. They were then delayed one week by default of their workmen and four weeks by default of masons, etc., employed by the defendants, and the work

guage or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions and does its work of justice and repose where the statute cannot be invoked."

Dickerson *vs.* Colgrove, 100 U. S., 580.

"Estoppel *in pais* operates in favor of a person who has been misled to his injury."

Ketchum *vs.* Duncan, 96 U. S., 659.

"Where a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim."

Swain *vs.* Seamens, 9 Wallace, 254.

"The law is well settled that a municipal corporation may waive conditions and estop itself."

Randolph County *vs.* Post, 93 U. S., 502.

"A county or other municipal corporation, being authorized by statute to borrow money and issue bonds for the payment thereof, if the bonds be made and delivered reciting the facts, which show them to have been regularly issued, the county is estopped to deny their regularity or to assert that they were not made in conformity to the statute."

Moran *vs.* Commissioners, etc., 2 Black, 722.

See also, Pendleton *vs.* Amy, 13 Wallace, 298.

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, in-

volve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced."

Zabriski *vs.* Cleveland, etc., R. R. Co., 23 Howard, 381 (402).

If the District did not intend that the terms of cancellation *quoad* pipe not cast, as set forth in the contractor's letter of date November 30, 1887, were acceptable it should have said so at the time. Having then remained silent when it ought to have spoken, it cannot now speak when it ought to remain silent. This for the reason that the Camden Iron Works parted with about $11,400 worth of pipe, which it never would have done unless misled by the silence of the District Commissioners.

V.

The plaintiff below was entitled to recover on the sealed contract for pipe actually delivered at contract rates, though all the pipe specified was not delivered.

On the subject of payments for material delivered the contract contains the following provision (R., p. 13):

"Payments will be made after August 1st and September 15th for all pipes, valves, and castings received and accepted in proper order and condition and in accordance with these specifications, less twenty (20) per cent. of the amount found due, to be reserved until the satisfactory completion of the contract."

Under this a cause of action would have arisen on the special contract upon the acceptance by the District of any consignment of pipe for the value thereof at contract prices, less the 20 per cent. retain, had the Camden Iron Works demanded payment therefor and payment had been refused.

It can make no difference, so far as concerns the right of action thus given by the contract, that the company did not demand payment until the so-called settlement was made in the auditor's office, and then only for the money wrongfully retained out of the contract price. This being refused, a right of action at once accrued on the covenants for all pipe delivered and not paid for at contract rates.

The clause about making payments, found under the head "General conditions, 1887–'88" (R., p. 15), requiring an estimate to be made by the Engineer Commissioner, was manifestly not intended to form a part of a contract for the purchase and delivery of material made according to certain definite specifications. It might apply to the work of laying the pipe after delivery, but it has no controlling or enlightening effect on this contract.

Even had the contract been an entirety, which clearly it is not, this action would still be maintainable.

The rule in such cases is that where the party suing has not departed from the terms of the special contract at all, but has been ready and willing to do all that it was the intention of the parties he should do, his action is properly said to be brought upon the special contract itself.

Cutter *vs.* Powell, Smith's Leading Cases, 8th ed., vol. II, part 1, p. 33.

"In an action for breach of contract by wrongfully putting an end to it, the party committing the wrong is estopped from denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred."

U. S. *vs.* Behan, 110 U. S., 338.

The point is conclusively decided in Phillips, etc., Construction Co. *vs.* Seymour *et al.*, 91 U. S., 642.

Mr. Justice Miller, in announcing the opinion of the court, well says:

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any spe-

cific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the opportunity of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed."

Counsel for the District rested their contention mainly on a supposed modification of the contract and an enlargement of the time of performance. But it is not shown that the parties "came to a subsequent agreement by parol to do a different thing than that which the covenant required" (1 East., 631). The Camden iron works had been prevented from commencing the work by the failure of the District Commissioners for more than 33 days to execute the contract. The work was further delayed for more than 30 days by the failure of the District to send forward an inspector after the Ludlow interview, about the 15th day of September, and necessarily delays were incident to the incompetency of the man Hoyt to act as inspector in rejecting more than one-seventh of the pipe actually cast, though the pipe so rejected complied substantially with every requirement of the specifications. The plaintiff below, therefore, averred in its declaration that it was "*prevented*" by the defendant from performing the contract. But there was no express or other agreement for an enlargement of the time of performance. That was brought about by the acts of the District, just noticed, and the District now seeks to take advantage of its own wrong as causing such a modification of the covenan as to prevent recovery on it.

Again, before the contract was fully performed the District requested that it be relieved from receiving all the pipe agreed to be delivered, and the Camden iron works assented to the request. Wherefore the declaration avers that the plaintiff was "*discharged*" from the full performance of its covenant.

But neither prevention of the performance of a covenant nor discharge from full performance is such a modification as will prevent an action on the covenant. For when a large and valuable portion has been done by one party and nothing remains but the payment of the price, the other party "so far waives absolute performance as to consent to be liable *on his covenant* for the contract price of the work when completed" (per Miller, J., in Phillips *vs.* Seymour, 91 U. S., 650).

So the plaintiff in error here is liable on its covenant for the contract price of the pipe actually delivered and accepted.

VI.

No penalties should be allowed, except to the extent of actual damage shown.

The contract provides for two kinds of penalties for delay, one of which is styled liquidated damages. They are as follows:

"In case the deliveries are not made as above specified there will be deducted from the contract prices herein specified one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent."

The other forfeiture is $10 per day "estimated as liquidated and fixed damages to the District, arising from failure to complete the work at the time specified."

Both of these may equally be considered as penalties and forfeitures for delay.

It is a general proposition that the law abhors a forfeiture.

The fact that the parties fix a sum to be paid and call it liquidated damages does not always control the question as to the measure of the recovery for the breach of the contract. Courts will look to the nature and purpose of fixing the amount of damages to be paid, and if the clause fixing the amount of damages appears to have been inserted to secure the prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered.

Scofield *vs.* Tompkins, 95 Ills., 193.
Bradstreet *vs.* Baker, 14 R. I., 549.

In Hahn *vs.* Horstman, 12 Bush. (Ky.), 254, Hahn sold a lot of ground for $1,800, agreeing in the deed to do certain work on the lot within a certain time or pay as liquidated damages $20 per day for each day's delay in completion, "to be deducted from the purchase price." There was a delay in completion of 368 days, for which the damages amounted to $7,360. The court say:

"To enforce this obligation by a judgment for the stipulated damages would be not only to deny the appellant the right to recover any part of the purchase-money, but to render judgment against him for several thousand dollars" (255).

"The bare statement of the proposition is a sufficient reason for treating the sum to be paid in the event of a breach as a penalty" (255).

"By the letter of the contract if the appellant had completed all the work but filling the alley, and this had remained unfinished for as long a period as ninety days after the breach, he would have forfeited the whole of the purchase-money.

"To hold the sum liquidated damages 'would not only amount to a judicial confiscation of Hahn's property, but

make the appellants pensioners upon his estate *ad infinitum.*'"

See also Greer *vs.* Tweed, 13 Abbott's Pr. N. S., 430.

In contract 815 $10 per day is stated as liquidated damages. There cannot be two amounts in same contract settled as such damages. So per cent. deduction must be penalty.

See Colwell *vs.* Foulks, 36 How. Pr., 306.

In Welch *et al. vs.* McDonald, 85 Va., 500, Welch agreed to furnish stone in accordance with plans and specifications to be furnished by McDonald by a certain date or pay $5 per day for each day's delay. Plans were not furnished. *Held*, McDonald could recover nothing for damages. The court say:

"The whole case bears the marks of a purpose on the part of the plaintiffs to drive the defendants into a failure, and then to extort from them a most unconscionable claim for consequential damages in addition to the damages fixed in the contract."

Unless the intent of the parties is very clearly expressed the forfeiture named for non-fulfillment of a contract, where excessive, will not be construed as intended to be liquidated damages.

Colwell *vs.* Lawrence, 38 N. Y., 71.

No damage was sustained by failure to deliver pipe as per contract, because Captain Symons says that they could not have been laid, giving as a reason that the appropriation for the water department would not permit it.

He therefore asked for a cancellation of the contract, concluding his request with the following significant words:

"The question of available funds is the only and sole question involved" (R., p. 33).

On the subject of penalties and liquidated damages the plaintiff in error was given "the benefit of all the law to which it was entitled" by the court below. The jury were instructed that there could be no deduction by reason of the one per cent. a day provision, because it was a penalty pure and simple, and no actual damage had been shown. The proposition is further stated thus:

"It is not stipulated for as liquidated damages, and it is out of all proportion to the damages the District might sustain by reason of non-delivery on time" (R., p. 49).

On the question of the $10 per day provision stipulated for as "liquidated damages," the court below was equally explicit. The jury were instructed that when they found a date at which the 136-day period should begin they should deduct from the plaintiff's claim $10 per day on pipe delivered after the contract time and the pay of the inspector during the same period (R., p. 56). This was a question of fact for the jury, and it was found against the claim of the defendant below.

VII.

The Camden Iron Works was not guilty of laches. It objected to the account as stated and made every reasonable effort to secure a settlement out of court.

The treasurer of the contracting company made several trips to Washington for the purpose of having the account fairly and amicably settled. So did the president. The latter also made two special trips to Detroit to see Colonel Ludlow, then no longer a District Commissioner.

Finally, in November, 1892, a letter was written to the Commissioners, going fully over the case and demanding a settlement. The company was advised by the District secre-

tary to apply to Congress for relief. This it did within two months thereafter.

Mr. Wood had no knowledge of the course of procedure in Congress, but had a bill introduced which he thought would be referred to the Commissioners, recommended by them, and promptly passed.

After waiting a year for this he employed counsel to take the case to court as the only means of securing payment. Shortly thereafter suit was begun and in the lifetime of the contract.

The Camden Iron Works tried in season and out of season to secure an amicable settlement, protesting all the while against the injustice done the company.

Why should it be charged with laches because it hesitated to go into court or incur a large expense for counsel fees?

VIII.

The question of interest was one for the jury to determine.

Section 829, Revised Statutes of the District of Columbia, provides that the rate of interest shall be 6 per cent., "and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the case."

If the jury found that the plaintiff should have interest, it must have been calculated at the rate of 6 per cent.

Demand of payment of the balance due for pipe furnished at contract rates was made by the plaintiff corporation immediately upon the receipt of the so-called statement of account showing that fines equal to the value of the pipe so delivered were charged against the company, and demand was constantly being made from time to time during the next five or six years and was met by constant refusal.

The matter of the right to recover interest is well stated by the court in Crawford *vs.* Willing, 4 Dall., 286. The syllabus reads:

"Interest is due on an ascertained balance of an account from the time of a demand of payment."

The court, in its opinion, says:

"Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement upon the subject of interest to the honest and rational rule that whenever one man retains the money of another against his declared will, the legal compensation for the use of the money shall be charged and allowed. * * * For my own part I am prepared to say, with the book cited, that interest ought to follow a debt as the shadow does its substance. Even in the case of goods sold and delivered, we think it right to allow interest as soon as the express or the implied term of credit had elapsed and a demand of payment was made."

If the contract has been merged in a judgment the matter of interest depends upon legislative enactment.

Morley *vs.* Lake Shore R. R. Co., 146 U. S., 168.
U. S. Mortgage Co. *vs.* Sperry, 138 U. S., 352.

It is said that interest is recoverable of right when it is reserved in the contract, but when it is given as damages it is within the discretion of the court to allow or disallow it, and it will not be allowed if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim.

Redfield *vs.* Ystalifera Iron Co., 110 U. S., 174.

In this case the plaintiff delayed entering up judgment for twenty-nine years after verdict, and the court allowed interest only from the time the judgment was entered.

Can the District of Columbia show laches on the part of the plaintiff as for delay in the institution of the suit when

it is brought within the statutory limit of time? Clearly not.

The matter of interest on the demand, under District laws, rests entirely with the jury. If they find interest, it must be at 6 per cent. Judgment must then be entered for a lump sum, principal and interest.

Thus the law stood and became a part of the contract between the parties at the time of the passage of the act of September 30, 1890, which provides that the rate of interest on judgments against the District of Columbia, when authorized by law (that is, in all actions *ex contractu*), shall be at a rate not exceeding 4 per cent.

The judgment was therefore properly entered on the verdict (R., p. 7). On this judgment interest runs at the rate of 4 per cent. only.

The three prayers of the plaintiff below were properly granted. None of them are based upon any modification of the contract, real or supposed.

The first told the jury that the plaintiff shall have the value of pipe actually delivered at contract rates, less deductions for payments made and liquidated damages under the $10 per day provision. The District having failed to show any loss by reason of delay in delivery, there could be no abatement as for the one per cent. per day provision, which was clearly a penalty as distinguished from liquidated damages.

The second instruction told the jury that if the delays were caused by any act or omission on the part of the District fines and penalties could not be charged therefor against the plaintiff.

The third instruction is an application of the doctrine of estoppel, and is so clearly right as to need no discussion. Not to have applied this doctrine to the case would have permitted the Commissioners to take advantage of their own wrong.

The defense to this action is well characterized by the apt

words of Agnew, J. (62 Pa. St., 307): "This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed." There is no reason shown in law or conscience why the District of Columbia should not pay the Camden Iron Works at contract rates for pipe delivered and accepted and used in the extension of the water service of the municipality. It is estopped from claiming fines and penalties as for delay in delivering pipe after the first of December, 1887, because it had agreed before such pipe was shipped to accept and pay for it "at the regular contract price without any deduction" (R., pp. 32 and 34). But for this agreement the pipe would not have been shipped (R., p. 36).

"The estoppel here relied on is known as an equitable estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is always applied so as to promote the ends of justice."

Dickerson *vs.* Colgrove, 100 U. S., 580.

The case was carefully tried below, and it is respectfully submitted that the judgment appealed from should be affirmed.

SAM'L MADDOX,
Attorney for Defendant in Error.